No. 374/14

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 217 OF 2011

JOSEPH MUSYOKI NZOKA ……..….APPELLANT

VERSUS

REPUBLIC ……...……..RESPONDENT

(*Being an appeal from the original conviction and sentence in Kithimani Principal Magistrate's Court Sexual Offences Case No. 14 of 2010 by Hon. A.W Mwangi, SRM on 14/4/2011)*

JUDGMENT

1. The appellant was charged with rape contrary to section **3(1) (a) (b)** of the **Sexual Offences Act No. 3** of **2006.** Particulars thereof being that on the **21st day** of **July, 2010** at **[Particulars Withheld]** in **Yatta District** within the **Eastern Province** intentionally and unlawfully did an act which caused penetration with his genitals namely, penis into the genitals namely, vagina of **K M** without her consent.
2. In the alternative the appellant was charged with the offence of indecent assault on a female contrary to **section 11(6)** of the **Sexual Offences Act No. 3** of **2006.** The particulars being that **21st** day of **July, 2010** at **[Particulars Withheld],** in **Yatta District** within the **Eastern Province** committed an indecent act to **K M** by touching her private parts namely vagina and breasts.
3. He was tried, convicted and sentenced to serve **ten (10) years** imprisonment.
4. Being aggrieved by the conviction and sentence thereof he appeals on the grounds that :-

i. The incident was blown out of proportion by PW3 the mother to the complainant as a result of malice and feud that existed between the two (2) families.
ii. The act was consensual between two (2) adults
iii. The sentence imposed was harsh

5. The prosecution's case was that **PW2, K M** the complainant sneaked out of school with her classmate **PW3, M M** and went to their home. The appellant who worked at PW3's home took the complainant to his house. He had carnal knowledge of her. In the meantime, PW3 searched for her and found her at the appellant's house. She peeped through the window and saw them in the act of coitus. They went back to school. Her school mates reported to their teacher what had transpired. Her parents were informed. The matter was reported to the police who investigated and caused the appellant to be charged.
6. In his defence the appellant narrated a sequence of events leading to his arrest on the **21st July,**

2010. He stated that he performed his daily duties on the farm until 3.00pm. At 6.00pm while leaving for the market he encountered four men who arrested him and took him to the Police Station. He denied having committed the offence.

7. The trial magistrate having evaluated the evidence adduced found that the appellant was positively identified as the person who knew the complainant carnally. He believed that the complainant did not consent to the act of intercourse. Though mentally retarded having observed her demeanor she was a honest witness hence returned verdict of guilty.
8. At the hearing of the appeal the appellant relied upon his written submissions. He stated that the complainant was his girlfriend and he had no idea she was mentally retarded. He stated that he was ready to marry her.
9. The appeal was opposed by the State. **Ms Maingi,** learned State Counsel submitted that the appellant was positively identified. The act of intercourse was proven. Evidence adduced was sufficient to establish the offence as charged.
10. This being the first appeal, I do remind myself of the duty of the first appellate court as stated in a wealth of cases, re-evaluate evidence adduced at trial and come up with my own conclusions bearing in mind that I neither saw nor heard witnesses who testified. (***See Okeno versus Republic [1972] E.A. 32).***
11. This is a case where the appellant distanced himself with the perpetration of the offence in his defence. However, after the learned trial magistrate evaluated the evidence adduced and found him guilty, in his mitigation he stated that the complainant voluntarily had sex with him. Further, he went on to state that the complainant was an imbecile, hence incapable of denying anything.
12. The issues to be determined therefore are;-

i. whether complainant was capable of making a sexual choice;
ii. Did she have the capacity to consent to the sexual relationship?

13. The trial magistrate did observe the demeanour of the complainant. She formed an opinion that she was a person with mental disability. Similarly, the Clinical Officer who examined her, PW1, **Alfred Toronke** also stated that she was mentally retarded. Infact at the time of examination she was not able to communicate. He was assisted by her relatives.
14. The complainant herein though aged **20 years** old having been born in **January, 1990** per the child health card produced in evidence; was a pupil in **Standard 7** which was evidence of a person with intellectual or mental incapacity.
15. Lack of consent is a vital element in the offence of rape ***(see Republic versus Oyier [2008] 1 KLR (G.F).*** The Black Law Dictionary defines consent as :-

> "***Agreement, approval, permission as to some act or purpose especially given voluntarily by a competent person"***

16. **Section 42** of the **Sexual Offences Act, 2006 Law** of **Kenya** provides thus:-

> "… ***a person consents if he or she agrees by choice, and has the freedom and capacity to make that choice".***

17. Evidence adduced and not challenged is that the complainant had never engaged in sex before. As a result of the act she had a torn hymen that was raw. She sustained posterior vaginal tears. There were visible spermatozoa and she had sustained an infection. Medical evidence established penetrative sexual intercourse.
18. The complainant sneaked from school over lunch hour and went with PW3 to their home. The reason why they went home was because PW3 was required to take some medicine. The appellant was called to give PW3 keys to the house. And as PW3 and another girl, **I** entered the house, PW2, the complainant remained outside. The appellant seized the opportunity. He held the complainant's hand and led her to his house. She went on to state thus:-

> "***Munyoki did bad manners to me. I had never done that before… we were both dressed up… I felt a lot of pain after the bad manners was done to me. I***

bled…"

19. On cross examination she said the appellant removed her underwear and his too. She was re-called for further cross-examination. In re-examination she stated that the appellant forced her to do bad things that she was not interested in. In his defence the appellant did not comment on the evidence adduced by the complainant.
20. Evidence adduced falls short of the complainant having expressly consented to the act. Implied consent may be inferred by conduct. The fact that the appellant held complainant's hand and led her into the house falls short of proving that she voluntarily entered the house having consented to what would follow thereafter. Describing the act as **'*bad manners*'** is an insinuation of some act that is dirty in nature. It cannot be said that she agreed by choice to do an act she considered bad. Therefore there is no indication of the complainant having consented to the sexual intercourse. Therefore she was indeed raped.
21. The sentence meted out by the trial magistrate is the minimum prescribed one for the offence in issue. In the premises, it was not harsh.
22. In the result, the appeal against the conviction and sentence is dismissed.
23. Order accordingly.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **17TH** day of **SEPTEMBER, 2014.**

L.N. MUTENDE

JUDGE